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In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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I.

The Union devotes the bulk of its brief (pages 32-86) to the contention that Section 8(b)(4)(ii)(B) of the Act would be unconstitutional if it were construed to prohibit consumer picketing at the premises of a neutral retailer which, though confined to the struck product, would have the predictable effect, if successful, of causing the retailer's customers to cease dealing with it altogether. Although we anticipated this contention in our opening brief (pages 22-25), the Union's extensive argument warrants a further reply.

a. It is settled law that "while picketing is a mode of communication it is inseparably something more and different." *Hughes* v. *Superior Court*, 339 U.S. 460, 464 (1950). It "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Bakery Drivers* v. *Wohl*, 315 U.S. 769, 776 (1942) (concurring opinion). Picketing "establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey." *Building Service Employees* v. *Gazzam*, 339 U.S. 532, 537 (1950).

Accordingly, it has long been established that "a State, in enforcing some public policy * * * could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *Teamsters* v. *Vogt*, 354 U.S. 284, 293 (1957).[1] And, in *Electrical*

[1] See *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (picketing to compel a violation of the state antitrust law); *Building Service Employees Union* v. *Gazzam*, *supra* (picketing to compel the employer to force his employees to accept the union as their representative); *Teamsters* v. *Hanke*, 339 U.S. 470 (1950) (picketing to compel self-employed persons to join the union); *Hughes* v. *Superior Court*, *supra* (picketing to compel retail stores to hire a certain proportion of black employees); *Plumbers Union* v. *Graham*, 345 U.S. 192 (1953) (picketing to compel an "all union" job); *Teamsters* v. *Vogt*, *supra* (picketing to compel the employer to force his employees to join the union); *American Radio Ass'n* v. *Mobile Steamship Ass'n*, 419 U.S. 215 (1974) (picketing to disrupt the business of employers with whom the union has no primary dispute).

Workers, Local 501 v. *NLRB*, 341 U.S. 694 (1951), it was held that Congress had the same power. There it was contended that the ban against inducement or encouragement of work stoppages by secondary employees, contained in the old Section 8(b)(4)(A) (and continued in the current Section 8(b)(4)(i)(B)), could not constitutionally be interpreted as reaching such inducement or encouragement as flowed from the mere imposition of a picket line at the premises where the employees were at work. The Court rejected this contention, stating (341 U.S. at 705):

> The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) carries no unconstitutional abridgment of free speech * * *. The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparable unlawful objectives [citing *Gazzam*, *Hanke*, *Hughes*, *Giboney*, *supra*]. There is no reason why Congress may not do likewise.

b. The Union seeks to distinguish *Electrical Workers* and most of the state cases (note 1, *supra*) on the ground that the picketing there was addressed to employees who were union members, whereas here it was merely addressed to members of the public. It is argued that Congress could constitutionally regulate the former because it is a "signal" to action, i.e., such picketing makes an appeal to individuals who are subject to group discipline based on common in-

terests and loyalties, habit, fear of social ostracism, or the application of severe economic sanctions; so that when they see the picket line, they can be expected to respond to it. Picketing which appeals to the public, on the other hand, has no such "signal" effect and is closer to the core notion of constitutionally protected free speech; to ban it, so the argument goes, runs afoul of the First Amendment, at least absent a specific showing that the picketing is directed to inciting or producing imminent lawless action or is likely to incite or produce such action. (Union Br. 40-79.)

This distinction, however, was presented and rejected in *Hughes* v. *Superior Court, supra.* In that case, a group of pickets peacefully patrolled the premises of a store owned by Lucky Stores, Inc., to compel the employer (Lucky) to hire black clerks in proportion to the number of black customers. The picket signs read: "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize." The picketing was peaceful and orderly; the pickets did not prevent customers or employees of Lucky from going to and from the store; and the picketing was unaccompanied by threats, misrepresentation, or intimidation. Nor was there a finding that the picketing in any way affected Lucky's business. The California Supreme Court nevertheless upheld an injunction against the picketing, on the ground that it was contrary to state policy to compel an employer to discriminate in hiring (32 Cal. 2d 850, 198 P. 2d 885 (1948)). It did so over the dissent of Justice Traynor,

who contended that, since the picketing did not possess "signal" aspects, it could not constitutionally be enjoined (32 Cal. 2d at 871, 198 P. 2d at 897). This Court affirmed the California court, holding that the picketing was validly enjoined, for "The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations"—that is, to compel employment on racial grounds (339 U.S. at 464).

The Court—speaking about the kind of consumer picketing there involved and not merely about picketing which is a signal to employees—explained (339 U.S. at 464-465):

> But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated" [quoting from *Bakery Drivers* v. *Wohl*, 315 U.S. 769, 776 (1942) (concurring opinion)]. Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

Accordingly, the Court concluded, "picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if * * * the purpose which it seeks to effectuate gives ground for its disallowance" (339 U.S. at 465-466).

In short, *Hughes* demonstrates that picketing in furtherance of an objective that government has a legitimate interest in regulating may be constitutionally interdicted even though it is not a "signal" to *employee* action, but seeks to attain its objective through an appeal to consumers not to patronize.[2] As the Court recently reaffirmed, "for First Amendment purposes, picketing is qualitatively 'different from other modes of communication.'" *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 311 n.17 (1979), quoting *Hughes* v. *Superior Court*, *supra*, 339 U.S. at 465.[3]

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[2] The Union attempts (Br. 65) to analogize the consumer picketing in *Hughes* to signal picketing because "about 50% of the [store's] customers * * * were Negroes * * * [and] the * * * store was systematically patrolled by pickets carrying placards stating that Lucky refused to hire Negro clerks in proportion to Negro customers" (339 U.S. at 461). But this ignores the very distinction the Union seeks to make between consumer picketing, which appeals to the "reason, loyalty, and other emotions" of the public to whom it is addressed, and picketing aimed at employee-union members, which is "backed by the threat of economic punishment." Union Br. 68; see Cox, *Strikes, Picketing and the Constitution*, 4 Vand. L. Rev. 574, 593-595 (1951). *Hughes* recognizes that both forms of picketing have effects greater than mere speech.

[3] As one informed commentator has stated:

> "What difference is there between the sympathetic cooperation of the public, on the one hand, and of workers, on the other? * * * All picketing is obviously conducted to coerce. The desired coercion is achieved through convincing customers not to enter, by persuading loyal employees to withdraw, by influencing job hunters to remain away, and by enlisting the aid of all other union folk with a prejudice against crossing picket lines. I do not suggest that peaceful picketing coerces those whose aid is requested. But I doubt if much support is won on intellectual conviction as to the merits of the cause. Most of it is probably induced by a combination of fear, prudence and social embarrassment—a sort of psychological coercion which compounds itself ultimately into economic coercion on the picketed business." Gregory, *Constitution Limitations on the Regulation of Union and Employer Conduct*, 49 Mich. L. Rev. 191, 207 (1950).

Nor may the Union (Br. 59-61) distinguish *Hughes* on the ground that the object of the picketing there was to compel the employer to commit an unlawful act, whereas here it would not be unlawful for consumers to boycott a retail store selling a struck product. In *Hughes*, too, the object of the picketing was not itself unlawful. As the Court stated in *Hughes* (339 U.S. at 468): "If because of the compulsive features inherent in picketing, beyond the aspect of mere communication as an appeal to reason, a State chooses to enjoin picketing to secure submission to a demand for employment proportional to the racial origin of the then customers of a business, *it need not forbid the employer to adopt such a quota system of his own free will*" (emphasis added).[4]

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[4] Mr. Justice Reed concurred on the ground that he read the opinion of the Supreme Court of California to hold that the pickets sought from Lucky a discrimination unlawful under California law and that picketing in furtherance of

To be sure, in *Hughes* the objective of the picketing, though not unlawful, was contrary to the public policy of the state, while here it is not contrary to the policy of the Labor Act for consumers to boycott a neutral employer for reasons of their own or even to be persuaded to do so as a result of publicity other than picketing.[5] However, in regulating secondary boycotts, neither the legislature nor the courts need declare the boycott itself unlawful or contrary to public policy; they may confine themselves to proscribing the attainment of the boycott objective by coercive means, such as picketing directed at neutrals. Thus, in *American Radio Ass'n* v. *Mobile Steamship Ass'n, supra,* the Court held that the state could constitutionally ban picketing of foreign flag ships which implored the public to "Ship American", because such picketing threatened to disrupt the businesses of American stevedoring companies and ship-

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an illegal object may be barred by a state under *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949). Justices Black and Minton similarly concurred on the ground that the case was controlled by the principles announced in *Giboney*. The Union suggests (Br. 61 n.17) that, if *Hughes* meant what the majority opinion said, "it was an unacknowledged expansion of *Giboney*." Yet the concurring opinions refute any implication that the Court's statement quoted above was inadvertent or the case's relation to *Giboney* was unperceived.

[5] A proviso to Section 8(b)(4) exempts from its prohibitions "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization," that products produced by an employer with whom the union has a primary labor dispute are distributed by another employer, so long as the publicity does not have the effect of cutting off the secondary employer's deliveries or inducing his employees to cease work.

pers that had dealings with those ships and the state had a legitimate interest "in preserving its economy against the stagnation that could be produced by pickets' disruption of the businesses of employers with whom they have no primary dispute" (419 U.S. at 231). See also *Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722 (1942). Similarly here, in furtherance of its legitimate goal of avoiding disruptions to commerce by "shielding unoffending employers and others from pressures in controversies not their own" (*NLRB* v. *Denver Building Trades Council*, 341 U.S. 675, 692 (1951)), Congress could ban the use of consumer picketing at secondary sites which has the intended or predictable effect of persuading the customers of the secondary employer to cease all trading with him, while permitting "publicity, other than picketing" which might achieve the same result without the special coercive features inherent in such picketing. "[P]icketing aimed at discouraging trade across the board with a truly neutral employer may be barred compatibly with the Constitution." *Babbitt* v. *United Farm Workers, supra,* 442 U.S. at 311 n. 17.[6]

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[6] The above analysis is not inconsistent with such cases as *Teamsters Union* v. *Newell*, 356 U.S. 341 (1958) and *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), cited by the Union (Br. 43-44). Those cases involve legislative or injunctive bans drawn in "sweeping and inexact terms" (*Carlson* v. *California*, 310 U.S. 106, 112 (1940)), which imposed a blanket prohibition against all peaceful picketing, including primary picketing.

c. The Union's reliance on *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972) (Br. 34-35), is misplaced. There, a city ordinance banned all picketing near a school, but exempted peaceful picketing of any school involved in a labor dispute. No valid legislative purpose justified this exemption, for the major justification offered—that nonlabor picketing is more apt to produce violence than labor picketing—was without any basis in fact. 408 U.S. at 100-102. Accordingly, the Court concluded that the ordinance discriminated on the basis of the message conveyed by the picketers and thus violated the Equal Protection Clause and the First Amendment.[7]

Here, on the other hand, as shown (page 3), Congress has a valid legislative purpose in banning secondary consumer picketing in a labor dispute where it has the predictable effect of causing a total boycott of the secondary employer's business. Hence, the fact that secondary consumer picketing is permitted in other contexts does not establish that Congress is discriminating against labor picketing, but only that other forms of secondary consumer picketing have not presented an evil which Congress has deemed it necessary to regulate. That the Labor Act's restriction on secondary consumer picketing does not discriminate against the message that

[7] The question whether *Mosley* requires invalidation of a state statute banning picketing at dwellings used solely for private residential purposes, but permitting picketing of homes used for other purposes, is presented in *Carey* v. *Brown*, No. 79-703.

unions may convey at secondary sites, but merely controls the special kind of pressure that picketing tends to impose on neutral employers, is confirmed by the fact that Congress did not preclude unions from conveying their message through publicity other than picketing (see note 5, *supra*).

In sum, the Act's regulation of consumer picketing is not directed at the communicative aspect of that activity, but rather at the coercive impact of that activity on neutral employers in labor disputes. Accordingly, the validity of such regulation is to be judged not by the rigorous First Amendment standards, but rather by a balancing of the respective interests involved—i.e., does the regulation further an important and substantial governmental interest and is the incidental restriction on the flow of information or ideas no greater than is essential to the furtherance of that interest? See *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *Cox* v. *Louisiana*, 379 U.S. 559, 563-564 (1965). See, generally, L. Tribe, *American Constitutional Law* 580-582, 598-601 (Foundation Press 1978). We have shown that the Act's regulation of consumer picketing satisfies this test.

II.

a. The Union argues (Br. 15-20) that *Tree Fruits*, 377 U.S. 58 (1964), establishes an absolute principle that product picketing is lawful no matter what its foreseeable impact on the neutral employer. It is claimed that the Court found that Congress' basic purpose was to avoid creating "a separate dispute with

the secondary employer," and accordingly, "[w]hen consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute." *Tree Fruits, supra,* 377 U.S. at 72. However, these statements were made in the context of a situation where the targeted product was only a small portion of the total goods sold by the neutral retailer, and thus it was possible to keep the union's dispute with the primary employer from affecting the neutral's business generally. Where, as here, the struck product constitutes all or substantially all of the neutral's business, or where, as in the merged product situation (Bd. Main Br. 18-22), the struck component cannot be segregated, an appeal to consumers not to purchase the struck product would, if successful, necessarily cause "customers not to trade at all with the secondary employer," and thereby create "a separate dispute with the secondary employer." *Tree Fruits, supra,* 377 U.S. at 72.

b. The Union further argues (Br. 13-14) that the Board's interpretation of *Tree Fruits* "operates in a manner obverse to what one would expect, given the basic focus of the secondary boycott prohibitions"—i.e., to avoid "pressure brought to bear * * * not 'upon the employer who alone is a party [to a dispute] but upon some third party who has no concern in it.' " For, the Board's view "would forbid struck product picketing of retailers closely tied economically to the primary employer, while permitting such picketing where the retailer is merely a purchaser

of the primary employer's product as one among many." However, the Board's finding, upheld by the court of appeals, establishes that the land title companies, although dependent on Safeco's product, are nonetheless not allied with Safeco, but are neutral employers who are powerless to resolve the underlying primary dispute.[8] There is nothing anomalous about Congress's deciding to protect such neutral employers from the effect of consumer picketing where it would have the intended or predictable effect of curtailing their entire business, but not where it would have a lesser impact.

c. Finally, there is no merit to the Union's contention (Br. 21-24) that the Board has returned to the economic impact test adopted by the court of appeals and expressly rejected by this Court in *Tree Fruits.* As noted in our opening brief (page 15, n. 11), the economic test of the court of appeals in *Tree Fruits* would have required a determination in each case of whether the union's picketing was likely to have a "substantial economic impact" on the neutral's business. By contrast, the test here is the one suggested by this Court in *Tree Fruits*—whether the picketing called for a boycott of the neutral's entire business. The latter test is easier to apply and the facts relevant to its application can be more readily determined by the union. Determining whether the struck product constitutes all or virtually all of the neutral's business should present no greater difficulty

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[8] The Union does not challenge this finding here (Br. 14 n. 3; 4 n. 2).

for the Union than does determining, for example, whether an employer is truly a neutral or allied with the primary employer (see *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y. 1948)), or whether a contractor is performing routine maintenance or capital improvement work at the primary employer's premises. See *Local 761, Int'l Union of Electrical, Radio & Machine Workers* v. *NLRB (General Electric Co.)*, 366 U.S. 667, 680-682 (1961).

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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